

Supreme Court, U.S.
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No.

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IN THE
Supreme Court of the United States

ENVIRONMENTAL DEFENSE, NATIONAL WILDLIFE
FEDERATION,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, U.S. FISH &
WILDLIFE SERVICE *et al.*,

Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a reviewing Court uphold a federal agency decision under the Administrative Procedure Act using a rationale not offered by the agency that conflicts with the agency's actual findings.



RULE 29.6 STATEMENT

The original plaintiffs and appellants below were American Rivers, Inc., Environmental Defense, Inc., and the National Wildlife Federation, Inc., Iowa Wildlife Federation, Kansas Wildlife Federation, Montana Wildlife Federation, Nebraska Wildlife Federation, North Dakota Wildlife Federation, South Dakota Wildlife Federation, and Izaak Walton League of America, Inc. They have no parent corporation and none of them are publicly held corporations. Environmental Defense and the National Wildlife Federation now respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

ADDITIONAL PARTIES BELOW

In the lawsuit below, additional parties were North Dakota, an Intervenor-Plaintiff, and the U.S. Army Corps of Engineers; Les Brownlee, Acting Secretary of the United States Army; U.S. Fish & Wildlife Service, Gale Norton, Secretary of the U.S. Department of Interior, Defendants, and the State of Nebraska, the State of Missouri, the Nebraska Public Power District, and Missouri River Energy Services, Intervenor-Defendants. For hearing purposes, this case was consolidated with several other cases whose parties were State of South Dakota, Ergon Asphalt and Emulsions, Inc.; Magnolia Marine Transport Company, Midwest Terminal Warehouse Company, Inc.; Mo-ark Association; Missouri River Keepers, Blaske Marine, Inc., the Mandan, Hidatsa and Arikara Nation, Conocophillips Company, Koch Materials Co., Jebro, Inc., Coalition to Protect the Missouri River, Tosco, a subsidiary of Phillips 66 Co.

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PETITION FOR CERTIORARI

Environmental Defense and the National Wildlife Federation petition this Court for a writ of certiorari to the U.S. Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, filed on August 16, 2005, is reported at 421 F.3d 618 (8th Cir. 2005). The opinion of the district court granting plaintiffs' motion for preliminary injunction was filed on July 12, 2003, and is reported at 271 F. Supp. 2d 230 (D.D.C. 2003). The opinion of the district court granting defendants' motion for summary judgment was filed on June 21, 2004, and is reported at 363 F. Supp. 2d 1145 (D.D.C. 2004). These opinions are reprinted in Appendix A.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on August 16, 2005. This Court has jurisdiction under 28 U.S.C. §1254(1). Original federal jurisdiction was provided by 28 U.S.C. § 1331.

STATUTORY PROVISIONS AT ISSUE

The claims in this action present cases and controversies primarily involving the following statutes: the Administrative Procedure Act, 5 U.S.C. § 706; the Endangered Species Act, 16 U.S.C. § 1531 et seq.; and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq. Relevant text is included below:

Administrative Procedure Act, 5 U.S.C. §706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * *

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The Endangered Species Act, Section 7(a)(2), 16 U.S.C. §1536, provides:

(a) Federal agency actions and consultations

...

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

INTRODUCTION

The fundamental question in this case is whether a court reviewing federal agency action should be free to ignore the actual findings of the agency that contradict that action and instead to construct a rationale for the decision from the court's own search through the record. Since *SEC v. Chenery*, 332 U.S. 194, 196 (1947), a bedrock principle of administrative law has been that a court will uphold an agency decision solely on the basis of the rationale actually offered by the agency. It must make a "careful and searching" but deferential review of the record, but only to determine if reasonable evidence in the record supports that agency rationale. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

In this case, the Court of Appeals established a legal principle that, while similar sounding, turns this basis of review on its head. It held that it could ignore even directly contradictory findings in an agency's actual decision if "evidence in the record adequately explains the decision." *In Re: Operation of the Missouri River System Litigation*, 421 F.3d 618, 634 (8th Cir. 2005) (emphasis supplied). In other words, in the absence of a rationale provided by the agency, the Court could construct a rationale from facts it found in the record. The problem with this approach is that in a technical case with thousands of record documents like this one, there are always some facts that can be taken out of their proper scientific context and proportion and identified in support of a position. The Eighth Circuit approach would therefore make judicial review in such cases largely meaningless.

The underlying issue in this case is whether the U.S. Army Corps of Engineers needs to reform its management of six large dams on the Missouri River to modestly restore some of the high spring river flows and low summer river

flows that occurred in the river naturally, known as the "natural hydrograph." Today, the Corps operates the dams to provide a constant, medium level of water flow from spring through fall to maintain a small number of barges on the lower river at all times. *American Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp. 2d 230 (D.D.C. 2003). For thirteen years, the U.S. Fish and Wildlife Service through three formal biological opinions ("BiOps") under the Endangered Species Act (ESA) and dozens of informal letters and reports, took the position that restoring some part of the natural hydrograph was needed to avoid jeopardy to the three species in addition to mechanical habitat mitigation. 271 F. Supp. at 242; J.A. XIII:9865-9889¹ (2000 BiOp detailing consultation history). The National Academy of Sciences endorsed this position, as did an independent science review panel formed jointly by the FWS and the Corps, 271 F. Supp. at 243-44, and there is not a single contrary biological judgment in the entire voluminous record. The Corps of Engineers also analyzed the economic implications of these flow changes and found that they increased economic benefits. *Id.* at 244.

Despite this corroboration, in December 2003, a new self-referenced "SWAT" team of the FWS suddenly reversed that position in an amended Biological Opinion after a consultation that lasted roughly thirty days. It eliminated any requirement to lower summer flows -- one half of the natural hydrograph—once the Corps reached 6% of its long-standing, separate requirement to create habitat mechanically. But remarkably, in this very Amended Opinion, the FWS still explicitly and repeatedly found that mechanical habitat

¹ The reference J.A. is to the Joint Appendix filed in the Court of Appeals. The Roman numeral, such as "XIII" refers to the volume, and the numbers such as "9865" to the pages of that appendix. This brief also includes references to "Am Rivers Supp. App. (page)", a supplemental appendix filed by American Rivers in that court.